

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAMGEN POWER SYSTEMS, LLC, a
Washington limited liability company,

Plaintiff,

v.

AGILIS ENGINEERING, INC., a Florida
corporation,

Defendant.

NO. 2:12-cv-01762-MJP

**PLAINTIFF RAMGEN POWER
SYSTEMS, LLC'S MOTION FOR
DETERMINATION OF
ATTORNEY'S FEES AND COSTS**

**NOTE ON MOTION CALENDAR:
Friday, December 5, 2014**

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1 *Smith v. Behr Process Corp.*,
2 113 Wn. App. 306 (2002)..... 2

3 **STATUTES**

4 28 U.S.C. § 1920 7

I. RELIEF REQUESTED

In the Court's Findings of Fact and Conclusions of Law [Dkt. No. 129] and the Judgment in a Civil Action [Dkt. No. 131] (the "Judgment") entered in this action, Plaintiff Ramgen Power Systems, LLC ("Ramgen") has been awarded its costs and attorneys' fees in an amount to be determined by subsequent motion and included by amendment to the Judgment.

Accordingly, Ramgen respectfully requests that the Court enter the Amended Judgment in a Civil Action submitted herewith, determining the amount of costs awarded to Ramgen to be \$62,381.34 and determining the amount of attorneys' fees awarded to Ramgen to be \$1,088,880.00. Ramgen's attorneys' fees request is based on (i) a "lodestar" calculation totaling \$907,400.00, applying the reasonable hourly rates of Ramgen's counsel Kelley, Goldfarb, Huck & Roth, PLLC ("Kelley Goldfarb") to the hours reasonably expended by Kelley Goldfarb on the litigation; and (ii) multiplying that lodestar calculation by a 1.2 enhancement, in light of the contingency fee retention and risks of nonpayment undertaken by Kelley Goldfarb.

As set forth below and in the Declaration of Michael A. Goldfarb submitted herewith (the "Goldfarb Declaration" or "Goldfarb Dec."), the amount of costs and attorneys' fees sought by Ramgen are reasonable and proper.

II. ARGUMENT

Washington State law governs the method for calculating an award of reasonable attorneys' fees and costs, given the Court's diversity jurisdiction over this lawsuit, as well as the Washington State law claims for breach of contract and breach of express warranties upon which Ramgen has prevailed. *See, e.g., Mangold v. California Pub. Utilities Comm'n*, 67

1 F.3d 1470, 1478 (9th Cir. 1995). Washington courts apply the “lodestar” method to
 2 determine a reasonable attorneys’ fee where, as here, the award is made under a contract.
 3 *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 773, 115 P.3d 349 (2005) (“In the
 4 absence of a predetermined method set forth in the contract itself, the proper method for the
 5 calculation of a reasonable fee award is the lodestar method.”).

6 The lodestar calculation involves “multiplying the total number of hours reasonably
 7 expended in the litigation by the reasonable hourly rate.” *Clausen v. Icicle Seafoods, Inc.*,
 8 174 Wn.2d 70, 81, 272 P.3d 827 (2012). “Once the lodestar has been calculated, the court
 9 may adjust the fee to reflect factors not considered yet. The two categories for adjustment are
 10 based on whether the fee was contingent on the outcome and the quality of work performed.”
 11 *Id.*; *see also Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593-94, 675 P.2d 193
 12 (1983).

13 **1. Ramgen’s Lodestar Calculation is Based on Reasonable Billing Rates for**
 14 **Kelley Goldfarb.**

15 “In determining the attorney’s reasonable hourly rate, the trial court may consider the
 16 skill level the litigation requires, the time limitations the litigation imposes, the size of the
 17 potential recovery, the attorney’s reputation, and the undesirability of the case.” *Smith v.*
 18 *Behr Process Corp.*, 113 Wn. App. 306, 341, 54 P.3d 665 (2002) (citing *Bowers*, 110 Wn.2d
 19 at 597). “Where the attorneys in question have an established rate for billing clients, that rate
 20 will likely be a reasonable rate.” *Bowers*, 100 Wn.2d at 579; *see also Herrera v. Singh*, 103
 21 F. Supp. 2d 1244, 1253 (E.D. Wash. 2000) (“The usual billing rate for a comparable attorney
 22 is a main factor.”). “Calculations of the reasonable rate will also be guided by the
 23 marketplace.” *Castello v. City of Seattle*, No. C10-1457MJP, 2011 WL 219671, at *2 (W.D.
 24 Wash. Jan. 24, 2011).

Here, Ramgen seeks fees determined by applying the established rates typically charged by Ramgen's counsel, Kelley Goldfarb. Those hourly rates are detailed in the Goldfarb Declaration, and, for instance, range from \$300 to \$400 for the Kelley Goldfarb attorneys of record in this litigation. Goldfarb Dec. at ¶¶ 6-7. As set forth in greater detail in the Goldfarb Declaration, those rates are reasonable given the background and experience of Kelley Goldfarb's attorneys, the skill required by the undisputed factual complexity of this action, the amount of damages at issue in the litigation, and the prevailing rates in the Seattle-area legal market. *See* Goldfarb Dec. at ¶¶ 2-10, 14. Accordingly, Ramgen respectfully requests an award of attorneys' fees utilizing those rates for the lodestar calculation.

2. Ramgen's Lodestar Calculation is Based on a Reasonable Number of Hours Expended by Kelley Goldfarb on This Litigation.

In order to determine if the number of hours expended is reasonable, the attorneys "must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.)." *Miller v. Kenny*, 180 Wn. App. 772, 822, 325 P.3d 278 (2014) (quoting *Bowers*, 100 Wn.2d at 597) (affirming trial court's lodestar calculation of over \$1 million in attorneys' fees based on a total of 3,229.8 hours, *even* where hours were not based on billing records but were arrived at by counsel's "going through the correspondence file and the extensive trial docket after the trial was over and estimating the time related to each item for each timekeeper").

In general, the Court may reduce the loadstar hours for time spent on unsuccessful claims. *Miller*, 180 Wn. App. at 824. "But where the plaintiff's claims involve a common core of facts and related legal theories, 'a plaintiff who has won substantial relief should not

1 have his attorney's fee reduced simply because the district court did not adopt each contention
2 raised.'" *Martinez v. City of Tacoma*, 81 Wn. App. 228, 243, 914 P.2d 86 (1996) (citing
3 *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). As the
4 Supreme Court explained in *Hensley*:

5 In other cases the plaintiff's claims for relief will involve a common core of
6 facts or will be based on related legal theories. Much of counsel's time will be
7 devoted generally to the litigation as a whole, making it difficult to divide the
8 hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as
a series of discrete claims. Instead the district court should focus on the
significance of the overall relief obtained by the plaintiff in relation to the hours
reasonably expended on the litigation.

9 *Hensley*, 461 U.S. at 435.

10 Here, the Goldfarb Declaration describes the categories, qualifications, and experience
11 of the Kelley Goldfarb attorneys who worked on the litigation, and includes detailed time
12 records, itemizing the services performed by those attorneys by date and the hours expended.
13 Goldfarb Dec. at ¶¶ 2-5, 11-15, Exs. A-B.

14 In addition, the claims on which Ramgen prevailed share a common core of facts with
15 Ramgen's unsuccessful claims, including the damages and relief requested. While the Court
16 denied Ramgen's claims for breach of implied warranties under the Uniform Commercial
17 Code ("UCC") and for professional negligence, the matters at issue in those claims were
18 essentially the same as Ramgen's claims for breach of contract and breach of express
19 warranty, on which Ramgen prevailed. Namely, the issues central to all of the claims were
20 the cause of the Rig's failure and whether Agilis breached a contract promise, a warranty, or a
21 standard. Moreover, the damages awarded by the Court on Ramgen's successful claims were
22 the same as the damages Ramgen sought under its unsuccessful claims. Thus, "the court is not
23 required to artificially segregate time in a case, such as this one, where the claims all relate to the
24

1 same fact pattern, but allege different bases for recovery.” *Ethridge v. Hwang*, 105 Wn. App.
 2 447, 461, 20 P.3d 958 (2001); *see also Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805
 3 (2008) (claims were inseparable where they “arose out of the same set of facts”).

4 Nevertheless, in an effort to avoid any doubt that the hours underlying Ramgen’s lodestar
 5 calculation are reasonable, Ramgen has excluded from those hours the time spent by Ramgen’s
 6 counsel to defeat Agilis’s second motion to dismiss, which motion was directed at Ramgen’s
 7 UCC claims. And Ramgen has excluded the time spent by Ramgen’s counsel considering options
 8 for bringing a motion for summary judgment, since Ramgen ultimately did not file a summary
 9 judgment motion. Goldfarb Dec. at ¶¶ 16-17.

10 Likewise, Ramgen has also excluded the following from its lodestar hours, to ensure
 11 its lodestar hours do not include even potentially duplicated or inefficient time:

- 12 • the time spent by Ramgen’s counsel for initial case evaluation,
- 13 • the time spent by Ramgen’s counsel investigating and understanding the
 14 discovery landscape and developing a strategy and plan for discovery after
 15 denial of Agilis’s motions to dismiss, and
- 16 • the time spent by paralegals and by a law clerk during discovery and through
 17 trial.

18 Goldfarb Dec. at ¶¶ 18-20.

19 The hours submitted in support of Ramgen’s lodestar calculation are amply
 20 reasonable. This technically complex matter entailed a formidable amount of discovery and
 21 factual analysis. As a few examples, the parties exchanged a half-terabyte of data in
 22 discovery — most of which comprised technically complicated engineering materials — and
 23 conducted 19 depositions. Agilis also submitted separate expert reports from no less than 14
 24

1 experts. Ramgen also successfully defeated two motions to dismiss and a motion for
 2 summary judgment by Agilis, as well as prevailing in large part on the parties' pretrial
 3 motions. Goldfarb Dec. at ¶¶ 14-15, 23. After eight days of trial, Ramgen's counsel achieved
 4 a judgment for Ramgen totaling \$8,607,303.72. *See* Judgment at 2.

5 Accordingly, Ramgen respectfully requests an award of attorneys' fees using the
 6 lodestar amount of \$907,400.00, based upon the hours and rates set forth in the Goldfarb
 7 Declaration. Goldfarb Dec. at ¶ 21.

8 **3. Ramgen Requests That the Court Apply a Multiplier of 1.2 to the**
 9 **Lodestar Calculation.**

10 Courts may apply a multiplier to the lodestar fee amount based on the contingent
 11 nature of a case and the risk that counsel will not be paid if no recovery is obtained. *See In re*
 12 *Washington Mut., Inc. Sec. Litig.*, No. 08-MD-1919 MJP, 2011 WL 8190466, at *1 (W.D.
 13 Wash. Nov. 4, 2011) ("In considering the lodestar multiplier, the Court finds that a multiplier
 14 of 1.2 is reasonable and properly reflects the risk of non-payment and the challenges
 15 Plaintiffs' counsel faced in pursuing this contingency-based case."); *Miller*, 180 Wn. App. at
 16 826 (affirming trial court finding that "[a] lodestar multiplier of 1.5 is appropriate given the
 17 contingent representation and risks this matter presented"); *Collings v. City First*
 18 *Mortgage Servs., LLC*, 177 Wn. App. 908, 928-29, 317 P.3d 1047 (2013) ("The trial court
 19 found a multiplier of 1.2 was appropriate because of the risk: plaintiffs' counsel carried the
 20 entirety of fees and costs.... Here, given the risk assumed by counsel in taking the Collings
 21 case, the trial court's application of a multiplier rests on tenable grounds."); *Bloor v. Fritz*,
 22 143 Wn. App. 718, 749, 180 P.3d 805 (2008) (affirming 1.2x multiplier based on contingency
 23 risk).

Here, except for approximately \$40,000 billed before the matter was converted to a contingency arrangement, Kelley Goldfarb's compensation was and is entirely dependent on Ramgen's ability to prevail in the case and then recover from Agilis. Pre-judgment, the technical complexity of this case posed substantial litigation risk, and Agilis was "steadfast in [its] denial of responsibility." *Bloor*, 143 Wn. App. at 749. Further, there is a risk of non-payment of the Judgment entered in this litigation. For example, Agilis Engineering, Inc. has "threatened" bankruptcy. Agilis also appears to have intentionally structured its corporate entities to impede collection efforts and thwart recovery. In fact, the day after the trial in this action concluded, Agilis incorporated a new entity called "Agilis, Inc." See Goldfarb Dec. at ¶¶ 23-24. Given the past and future risk of non-recovery, a modest 1.2 multiplier is warranted.

Accordingly, Ramgen respectfully requests that the Court apply a 1.2 multiplier to the lodestar calculation in determining the award of attorneys' fees to Ramgen.

4. Ramgen's Litigation Costs.

Under Washington law, in addition to taxable costs, the court may award the prevailing party its other litigation costs in a dispute regarding a contract with an attorneys' fees and costs clause. *Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 491, 910 P.2d 486 (1996) (finding that costs provision in contract "would be superfluous if interpreted to mean the equivalent of statutory costs"); see also *Ethridge*, 105 Wn. App. at 462.

As set forth in the Goldfarb Declaration, Ramgen has submitted a Cost Bill under 28 U.S.C. § 1920 et seq. and also incurred additional costs in this litigation. Together, Ramgen's taxable and non-taxable costs total \$62,381.34. See Goldfarb Dec. at ¶¶ 25-27, Exs. D-F.

Ramgen respectfully requests that the Courts' award of costs to Ramgen comprise this amount.

III. CONCLUSION

For the foregoing reasons, Ramgen respectfully requests that the Court enter the Amended Judgment in a Civil Action submitted herewith, determining the amount of costs awarded to Ramgen to be \$62,381.34 and determining the amount of attorneys' fees awarded to Ramgen to be \$1,088,880.00.

RESPECTFULLY SUBMITTED this 20th day of November, 2014.

KELLEY, GOLDFARB, HUCK & ROTH, PLLC

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system on November 20, 2014 and was served via the Court's CM/ECF system on all counsel of record.

/s/ Michael A. Goldfarb

Michael A. Goldfarb, WSBA No. 13492